

No. 2731.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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ALASKA PACIFIC FISHERIES, a Corporation,  
Plaintiff in Error,  
vs.  
TERRITORY OF ALASKA,  
Defendant in Error.

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**PETITION FOR REHEARING.**

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HELLENTHAL & HELLENTHAL,  
Attorneys for Plaintiff in Error.

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THE JAMES H. BARRY CO.  
**Filed**

6674 - 1916

**F. D. Monckton,**  
Clerk.



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PETITION FOR REHEARING.

Comes now the plaintiff in error and respectfully petitions this Honorable Court for a rehearing herein upon the grounds and for the reasons hereinafter enumerated:

In the case of Alaska Mexican Gold Mining Company against the Territory of Alaska, No. 2727, a petition for rehearing was filed. The matters presented in that case are in many respects similar to those presented in this cause.

The first, second and third reasons assigned and discussed for a rehearing in that cause also present themselves here. We will not, therefore, burden the Court

by again repeating what was there said. The sixth ground urged and discussed in our petition for rehearing in the case of Alaska Mexican Gold Mining Company against the Territory, also presents itself in this cause. This is the most important point that we desire to urge. It deals with the question of whether the tax imposed is valid, notwithstanding the fact that it is not uniform upon the same class of subjects and it is not assessed according to value.

The 9th section of the Organic Act provides:

"All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessment shall be according to actual value thereof."

The Court held that the tax in question being a license tax need not comply with these requirements, and in relation to this matter say:

"We take it to be undisputable that the creation of revenue by the imposition of license taxes upon carrying on all business is in a general sense a rightful subject of legislation, but in this matter inquiry into the general questions is unnecessary for as already pointed out we have express transfer of authority to the Territorial Legislature to impose license taxes. The power, therefore, being in the Legislature, such taxes may be imposed without the restrictive limitations which must control in levying taxes upon property in its usual sense."

We think the Court received the wrong impression in regard to the intention of Congress as expressed in

the Organic Act in relation to this matter of license taxes. One of the most potent reasons why we are of this opinion is found in one of the provisions of Section 9, to which we did not direct the attention of the Court in any of our briefs in any of these tax cases. Nor was this done upon the hearing. This provision is found in Section 9, the same section that contains the limitations upon the taxing power, and reads as follows:

“and all laws passed or attempted to be passed by such Legislature in said Territory, inconsistent with the provisions of this section, shall be null and void.”

Now the provisions of Section 9, the section in which this provision occurs, include the following limitations upon the taxing power:

“All taxes shall be uniform upon the same class of subjects, shall be levied and collected under general laws and shall be assessed according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of 1% upon the assessed valuation of property therein in any one year, nor shall any incorporated town or municipality levy any tax for any purpose in excess of 2% of the assessed valuation of property within the town in any one year.”

It was pointed out in our brief, and we think upon this question there can be no dispute, that the tax in question was not uniform upon the same class of subjects and was not assessed according to the value

of the thing which formed the subject of taxation, and there is, of course, no way to tell whether the tax levied exceeds 1% upon the value of the property taxed or not, because no assessment of the property was made. In view of the fact that these limitations are contained in Section 9, a section which contains the proviso that legislation that does not conform to the limitations therein contained shall be void, we think this Act of the Legislature should be declared void and we think this should follow irrespective of any provisions contained in any other sections of the Organic Act. The insertion of this provision by Congress in the Act, clearly shows that it was the intention of Congress that the limitations imposed in Section 9 should in no wise be modified or restricted because of provisions contained in any other section of the Organic Act. Section 9, because of this express provision declaring legislation in conflict with the limitations contained in that particular section, void, must be construed by itself. And since the limitations upon the taxing power are such that "all taxes" must conform thereto, and the tax in question being such that no attempt was made to in any sense conform therewith, we think that if for no other reason, because of the express mandate contained in the section to which we have above referred, the tax should be declared void.

In our brief we discussed the various constitutional provisions as well as the decisions thereunder touching



similar limitations upon the taxing powers, but, however necessary this discussion may have been to the proper presentation of the case, the fact remains that this particular case must, after all, stand upon its own bottom. For no other Constitution contains limitations on the taxing power so sweeping and exacting as does the Alaska Organic Act. Nor does any other Constitution contain an express provision to the effect that any legislation that does not comply with these limitations is void.

We are fully in accord with the Court in the expression of the opinion that the levying of a license tax or any kind of a tax is a rightful subject of legislation, and we think that such a tax could be levied by the Territorial Legislature if it conformed to the express limitations upon the taxing power, and our objection to the tax in question is not specifically that it is a license tax, but is that the tax does not conform to the provision requiring all taxes to be uniform upon the same class of subjects and requiring all taxes to be assessed according to the value of the thing taxed.

Section 3 of the Organic Act contains a proviso which reads as follows:

“provided that this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses.”

As we have already pointed out, this provision is found in Section 3, and as Section 9, because of the peculiar mandate contained therein, must be construed

by itself to the extent that provisions elsewhere found in the Organic Act cannot operate to restrict or otherwise affect the application of the limitations contained in Section 9. This provision can have no effect, therefore, upon the validity or invalidity of the tax, whatever its effect might have been if the mandate contained in Section 9 had not been there inserted.

As we stated in our petition in the case of *Alaska Mexican* against the Territory, however, we are inclined to the opinion that the Court received the wrong impression from the reading of this proviso. The impression the Court received from it was that this proviso expressly recognized the right to impose license taxes. That is to say, that the right to impose licenses was equivalent to the right to impose license taxes.

A license being an exaction under the police power, required for the purpose of regulation only, differs from a license tax which is imposed in the exercise of the taxing power for the purpose of raising revenue and the authorities hold that a grant of power to require licenses does not include the power to lay a license tax.

The authorities upon this question were reviewed by us in the brief and referred to, to some extent at least, in the motion for a rehearing in the case of *Alaska Mexican Gold Mining Company vs. Territory*. It is not necessary, therefore, that we should again enter into a detailed discussion of this matter here. In our motion for rehearing in that case also we dis-



cussed at some length the various provisions of the Organic Act with a view of showing that the intention of Congress as gathered from the whole act, was not that the Territorial Legislature should have the power to impose license taxes in such a manner as to in any sense violate the limitations upon the taxing power contained in the Organic Act. Upon this question also we will not again burden the Court with a lengthy discussion, but submit the matter upon the discussion contained in our application for a rehearing in the case of the Alaska Mexican against the Territory.

There is one further proposition that arises in this case that did not arise in the case of the Alaska Mexican against the Territory, and it is this, that the tax imposed, while it is denominated a license tax, is in fact not a license tax at all, but a property tax levied without regard to uniformity and without regard to assessment according to value and without regard to the further question of whether it exceeds 1% of the value of the property taxed.

The amount of the tax does not depend upon anything except the number of cases of salmon and is levied at the rate of so many cents per case, depending upon the character of the salmon packed. It seems to us that this is not a tax upon the business at all, but a tax upon the product of the business. It has been often held that a tax of this character is a property tax, notwithstanding the fact that it is called a license tax and the authorities bearing upon

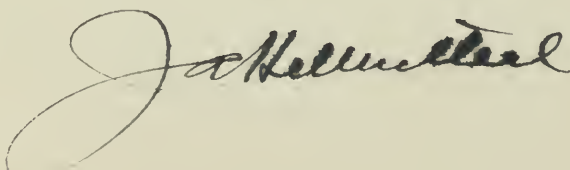
that question have been collected and discussed in our brief.

We direct the special attention of the Court to this point, in view of the fact that it was not specifically passed upon by the Court in rendering the opinion. The point is of especial importance in view of the opinion expressed by the Court that license taxes could be levied in Alaska without complying with the limitations imposed upon the taxing power, for by thus taxing property under the guise of requiring a license tax, these limitations are also avoided in levying property taxes.

Respectfully submitted.

HELLENTHAL & HELLENTHAL,  
Attorneys for Plaintiff in Error.

J. A. HELLENTHAL hereby certifies that he is counsel for the plaintiff in error, the petitioner herein, and that in his judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

A handwritten signature in dark ink, appearing to read "J. A. Helleenthal". The signature is written in a cursive style with a large, looping initial "J".